Filed 7/27/10 Fitzpatrick v. Hon Hai Precision Industry Co. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANIEL FITZPATRICK, Plaintiff and Appellant, v. HON HAI PRECISION INDUSTRY COMPANY, LTD. et al., Defendants and Appellants.	G040750 (Super. Ct. No. 06CC02832) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail A. Andler, Judge. Reversed and remanded with directions.

Law Offices of James A. Rainboldt and James A. Rainboldt for Plaintiff and Appellant.

Seyfarth Shaw, William H. Lancaster, Timothy L. Hix and Rishi Puri, for Defendants and Appellants.

Daniel Fitzpatrick's employment was terminated by NWE Technology, Inc. (NWET). Although NWET claimed the termination was simply part of a normal round of employee layoffs, the jury concluded Fitzpatrick's termination was improperly motivated by his decision to take a statutorily protected period of family leave.[1] The jury awarded him $37,000 for lost wages and $20,000 for emotional distress. The jury also awarded punitive damages of $500,000 against NWET and punitive damages of $100,000 against Hon Hai Precision Industry Co., Inc. – NWET's parent company – which the jury concluded was so integrated with NWET that it controlled NWET's day-to-day employment decisions.

Defendants moved for a judgment notwithstanding the verdict (JNOV),[2] which the trial court granted on the issue of punitive damages, but denied on the issue of compensatory damages – resulting in a net judgment of $57,000 in favor of Fitzpatrick and against NWET.[3]

Fitzpatrick appeals, raising three issues. First, he contends the court erred in granting the JNOVs as to punitive damages against Hon Hai and NWET, because substantial evidence supported both awards. Second, Fitzpatrick contends the court erred by summarily adjudicating his cause of action for fraud, which was based upon allegations defendants had intentionally misled him concerning the tax consequences of Hon Hai stock bonuses granted to him in the course of his employment. And third, he argues the court erred in taxing certain portions of his cost bill.

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[1] "California's Family Rights Act (CFRA) and the federal Family and Medical Leave Act (FMLA) provide similar protections to employees needing family leave or medical leave. (Gov. Code, § 12945.2 subd. (a); 29 U.S.C. § 2612(a).) . . . CFRA generally provides that it is unlawful for an employer to refuse an employee's request for up to 12 weeks of 'family care and medical leave' in a year. (Gov. Code, § 12945.2, subd. (a).) An employer is also forbidden from discharging or discriminating against an employee who requests family leave or medical leave. (Gov. Code, § 12945.2, subd. (l).)" (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6.)

[2] The jury's verdict also imposed liability on a third related entity, Foxconn Electronics, Inc., which also moved for a JNOV. Fitzpatrick does not challenge the trial court's order granting the JNOV in favor of Foxconn, and thus we need not consider whether there was substantial evidence to support the jury's verdict against it as well.

[3] Although those compensatory damages were imposed, jointly and severally, against all defendants in the original judgment, for some reason they were imposed against NWET only in the final judgment.

NWET cross-appeals[4] claiming the court erred in failing to grant its motion for a JNOV entirely, on the ground the evidence was insufficient to support the jury's award of compensatory (as well as punitive) damages. We are not persuaded by that contention, because the record includes sufficient evidence to support the conclusion Fitzpatrick was damaged by the wrongful termination of his employment, both emotionally and financially. The evidence need not be compelling, only sufficient, and it was in this case.

With respect to Fitzpatrick's claims, we conclude he waived his right to appeal from the order summarily adjudicating his fraud cause of action. Fitzpatrick's notice of appeal is quite specific as to the list of issues encompassed, and no amount of "interpretation" will result in the inclusion of the summary adjudication order on that list. Fitzpatrick himself recognized that, and thus attempted to file an amended notice of appeal in the superior court which included the summary adjudication order. That amended notice was rejected by the court with instructions that he must file a motion for leave to file it with this court. He did not.

However, we conclude Fitzpatrick's appeal from the order granting a JNOV on the punitive damage award made against NWET fares better. The jury expressly found NWET's termination of Fitzpatrick's employment was motivated by his utilization of protected family leave time, and thus it necessarily rejected NWET's assertion the termination had been solely the product of a normal layoff, unrelated to the leave. As such, the jury's verdict amounted to a determination NWET lied about the reason for terminating Fitzpatrick's employment, and thus supported the inference it understood its

[4] The notice of cross-appeal was filed on behalf of all three defendants, including NWET, Foxconn, and Hon Hai, and reflects an intention to challenge various orders, and to protectively cross-appeal from the original judgment. However, the opening brief in support of the cross-appeal affirmatively challenges only the court's refusal to grant the JNOV in its entirety, on the ground the evidence was insufficient to support the jury's award of compensatory damages as well as punitive. Only NWET was aggrieved by that ruling, since its result was that judgment was entered against only NWET.

true reason for doing so was wrongful – but did it anyway. Those facts were sufficient to demonstrate NWET acted with malice.

There was also sufficient evidence of NWET's financial condition to support the punitive award. Again, the evidence was not abundant, but Fitzpatrick was able to elicit sufficient evidence to demonstrate NWET was, at the time of trial a "700 million dollar" company, with profits in the millions of dollars annually. That evidence came from NWET's own senior management, and was not disputed. When we contrast that with the total amount of punitive damages awarded against NWET in this case – $500,000 – we have no trouble concluding the amount was reasonably calculated to punish, but would clearly not destroy, NWET.

However, we conclude the court did not err in granting the JNOV as to the $100,000 in punitive damages separately awarded against Hon Hai. There was no evidence of Hon Hai's financial condition, separate from the evidence offered in connection with NWET, and no evidence that any specific officer or director of Hon Hai itself ratified the specific wrongful termination at issue in this case. And while Fitzpatrick relies upon the jury's conclusion (unchallenged by defendants) that Hon Hai was directly responsible for the day-to-day employment decisions of NWET – and thus the two entities share responsibility for Fitzpatrick's termination – that concession is not sufficient to support a separate award of punitive damages against Hon Hai in this case. The fact Hon Hai exercises control over NWET's employment decisions in no way establishes the two entities are so *financially* intertwined that evidence of the financial condition of one would necessarily be sufficient to establish the financial condition of the other. Nor does it establish Hon Hai did anything to justify a *separate* award of punitive damages against it.

The judgment is reversed, and the case remanded with instructions to reinstate the award of $500,000 in punitive damages against NWET.

FACTS

Fitzpatrick filed his complaint in February of 2006, alleging wrongful termination in violation of public policy, and fraudulent deceit. In his complaint, Fitzpatrick named three defendants: NWET, his employer at the time of termination; Foxconn, the alleged "parent company" of NWET, which allegedly exercised "substantial authority in devising and implementing the personnel policies and practices" of NWET; and Hon Hai, the alleged parent company of both Foxconn and NWET, which also allegedly exercised "substantial authority in devising and implementing the personnel policies and practices" of NWET.

In his wrongful termination claim, Fitzpatrick alleged he was hired in 1998, and rose to the level of "Director of Business Development" at NWET, before his employment was wrongfully terminated "by defendants" in January of 2004, based upon (1) their bias against non-Taiwanese individuals; and (2) his utilization of statutorily protected family leave time. He alleged the termination caused him to suffer "severe and lasting emotional distress," and "loss of revenue in the form of wages, salary and benefits." Fitzpatrick also alleged that his termination had been carried out in an "oppressive and malicious manner," and warranted an award of exemplary damages.

In his fraudulent deceit claim, Fitzpatrick alleged that during his employment with both defendants Foxconn and NWET, he received bonuses in the form of Hon Hai stock. He said he was told by his supervisor that "the company" would pay the tax on the bonus income. As a consequence, he justifiably relied upon defendants to withhold taxes from his bonus pay, and unbeknownst to him, the company did not do so. Because of these misrepresentations, he allegedly incurred damages in the form of "overdue taxes and penalties imposed by the Internal Revenue Services."

Defendants moved for summary adjudication of Fitzpatrick's cause of action for fraudulent deceit, arguing among other things that he could not demonstrate

"justifiable reliance" on their alleged representations made in connection with the tax implications of the bonus payments. The court granted the motion on that basis.

The case then went to trial solely on Fitzpatrick's cause of action for wrongful termination based upon race and upon his utilization of statutorily protected family leave. Fitzpatrick testified regarding various things which led him to believe he was treated differently than Asian employees in similar positions, as well as comments which suggested his superiors at NWET were resentful about the fact he had taken leave from his job to care for foster children.

Fitzpatrick also testified about his history of stress-related issues, but denied any significant problems prior to his employment with Foxconn and NWET. However, for a two-month period in 2002, during his employment with NWET, Fitzpatrick saw a psychiatrist, William Waterfield, for treatment of panic attacks, depression and anxiety, which Waterfield concluded were related to NWET's decision to offer Fitzpatrick a promotion to Director in name only, while expressly denying him the benefits of the position. Waterfield testified at trial, explaining that he had diagnosed Fitzpatrick as suffering from an "[a]djustment disorder with mixed anxiety and depression" as a result of his treatment in the workplace. In Waterfield's opinion, Fitzpatrick had a strong work ethic, and despite the problems he encountered, was committed to his employment with NWET, and unwilling to "give up in the face of adversity." At the conclusion of their two-month treatment period, Waterfield viewed Fitzpatrick as "much improved" but had no opinions concerning Fitzpatrick's mental state subsequent to that time. Fitzpatrick himself did not testify about suffering any specific or exacerbated stress, or describe any particular effects of such stress, in the wake of NWET's termination of his employment.

Several individuals who were or had been employed by one or more of the defendants during Fitzpatrick's tenure with first Foxconn, and later NWET, were called to testify during Fitzpatrick's case-in-chief. Defendants' position, as expressed through

these employees, was that Fitzpatrick's employment termination had been part of an NWET company-wide layoff which was effected toward the end of Fitzpatrick's period of family leave, but that the timing was coincidental, and the decision to terminate Fitzpatrick's employment had been unrelated to either his race or his utilization of family leave time.

At the conclusion of Fitzpatrick's case-in-chief, defendants informed the court they wished to move for a nonsuit. The court deferred the issue, instructing defendants "You may call witnesses, without prejudice to your making whatever motions you have to make to the court."

Defendants called only one witness, a financial expert who opined Fitzpatrick had suffered less than $12,000 in economic damages as a result of his termination – an opinion based primarily on an assessment of additional earnings he would have received had he remained an employee of NWET (but did not receive at the next job he took), rather than any period of unemployment. Following that expert's testimony, defendants rested. Defendants had also designated an additional expert, David. Glaser, M.D., to testify regarding Fitzpatrick's emotional and psychological issues, but ultimately chose not to call Glaser to testify at trial. In lieu of such testimony, the parties agreed Glaser's written report, reflecting the statements made to him by Fitzpatrick, as well as his own conclusions about the effect of the termination on Fitzpatrick's emotional state, could be admitted into evidence. The record reflects it was entered on behalf of plaintiff.

The jury returned a special verdict, in which it found that while Fitzpatrick's "race, ethnicity and/or national origin" did not play a part in the termination of his employment, his utilization of statutorily protected family leave was a motivating factor in that termination. The jury further determined that both Hon Hai and Foxconn controlled the day-to-day employment decisions of NWET, and had made the final decision regarding Fitzpatrick's employment. The jury found that NWET's wrongful

termination of Fitzpatrick's employment caused him $37,000 in lost wages, and $20,000 in emotional distress damage. The jury concluded that one or more officers of each defendant acted with malice, oppression or fraud, and imposed $100,000 in punitive damages against Hon Hai, $225,000 in punitive damages against Foxconn, and $500,000 in punitive damages against NWET.

Based upon the jury's verdict, the court entered judgment against defendants' jointly and severally, for $882,000. All three defendants filed motions for a new trial, and for a JNOV. The court granted the motion for JNOV with respect to the jury's awards of punitive damages against defendants, concluding the evidence was insufficient to establish any defendant's "current financial worth," or that defendants had acted with "malice fraud or oppression." However, the court denied the motion for JNOV with respect to the jury's award of compensatory damages, and denied the motion for new trial as "moot." For reasons that are not clear in the record, the court then entered a new judgment *against NWET only* for compensatory damages in the amount of $57,000.

I

Fitzpatrick first challenges the court's order summarily adjudicating his claim for damages based upon fraud. However, as defendants point out, Fitzpatrick's very specific and detailed notice of appeal does not include any challenge to that order. And while we are required to construe such notices liberally (Cal. Rules of Court, rule 8.821 (a)(2)), there is nothing in the language of Fitzpatrick's notice of appeal which would permit us to construe it as including something which it does not.

As our Supreme Court stated long ago, "[i]t is elementary that an appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal." (*Glassco v. El Sereno Country Club, Inc.* (1932) 217 Cal. 90, 92.)

Thus, "[w]hile a notice of appeal must be liberally construed, it is the notice of appeal which defines the scope of the appeal by identifying the particular judgment or

order being appealed. (Cal. Rules of Court, rule 8.100(a)(2); *Luz v. Lopes* (1960) 55 Cal.2d 54, 59; *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-362.)" (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967.) The rule of liberal construction will save a notice of appeal only where "is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes*, *supra*, 55 Cal.2d at p. 59.)

In this case, we cannot not say that defendants could not possibly have been misled or prejudiced by a construction of Fitzpatrick's notice of appeal which deemed it not to include a challenge to the summary adjudication order. In fact, as defendants point out, even Fitzpatrick himself did not construe the notice that way, which is why he subsequently attempted to file an "amended" notice of appeal, specifically adding the summary adjudication order to the list of challenged rulings. However, the "amended" notice was expressly rejected by the superior court, with directions that Fitzpatrick must apply for leave to file an amended notice of appeal with this court.

Fitzpatrick apparently declined to seek leave to amend his notice of appeal, which certainly would have entitled defendants to assume he did not, in the end, intend to pursue that additional issue. Consequently, if we now "construed" the notice as including the additional issue, it would be difficult, if not impossible, to assert that defendants had not been misled or prejudiced. We therefore cannot construe Fitzpatrick's notice of appeal as including any challenge to the order granting summary adjudication, and will not review the merits of that order.

II

We turn to the court's ruling on defendants' motions for JNOV, but rather than continuing with the arguments raised in Fitzpatrick's appeal, we will first address NWET's contention, asserted in the cross-appeal, that the court erred in failing to grant its motion with respect to the jury's award of compensatory damages to Fitzpatrick. If

that argument prevails, it would render moot Fitzpatrick's contention the court erred in granting the JNOV with respect to the award of punitive damages.

The parameters for a motion for JNOV are set forth in Code of Civil Procedure section 629: "The court, before the expiration of its power to rule on a motion for a new trial, either of its own motion, after five days' notice, or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made."

A partial JNOV is proper in circumstances where a party establishes that some discrete aspect of the verdict, involving a particular cause of action or claim for damages, is either wholly unsupported by evidence, or contrary to law (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310), but the procedure does not authorize a mere *reduction* in the amount of a single item of damages included in the verdict rendered against the moving party, since such a reduction would not entitle the complaining party to a judgment *in its favor* on the point.

NWET argues it was entitled to a JNOV with respect to compensatory damages because there was insufficient evidence adduced at trial to support the conclusion Fitzpatrick suffered either economic damages or emotional distress damages as a result of his employment termination. The standard to be applied in reviewing such a contention is well-settled: "A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.) [¶] . . . As in the trial court, the standard of review is whether any substantial evidence – contradicted or uncontradicted – supports the jury's conclusion." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

NWET asserts there was insufficient evidence that the termination of Fitzpatrick's employment caused him any financial damage, because he admittedly failed

to make any efforts to obtain a new job for six months thereafter, choosing instead to spend that time with his foster children. Then, when Fitzpatrick applied for another job at the conclusion of the six-month period, he obtained one almost immediately. According to NWET, these facts, taken together, give rise to the inference that "[h]ad [Fitzpatrick] undertaken that effort to find new employment during the . . . period between January 2004, when he received written notice of his layoff, and March 2004 when he ceased to work at [NWET], there was no evidence, nor reason to believe, that he could not have been fully employed immediately."

However, it was defendants, and not Fitzpatrick, who had the burden of proof on this issue, and, as explained in *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, the jury was not required to draw any inferences in their favor. In *Hope*, plaintiff recovered economic damages in an amount which reflected the jury's implicit determination that he could never work again. In response to defendant's assertion the evidence was insufficient to support such a finding, the court noted: "[t]his argument is based on a faulty legal premise, namely, that the employee has the burden of proving an inability to work. 'The general rule is that the measure of recovery . . . is the amount of salary . . . for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. . . . [T]he employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.' (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182.)" (*Hope v. California Youth Authority, supra,* 134 Cal.App.4th at p. 595, italics omitted.)

Here, it was undisputed that Fitzpatrick remained unemployed for a period of six months after his employment was terminated by NWET. Defendants offered no affirmative evidence that other comparable employment was actually available to an

employee such as Fitzpatrick at any point during the period between the date he was terminated from NWET, and the date he later obtained new employment. And in light of the undisputed fact that NWET itself was laying off other employees at the time it terminated Fitzpatrick's employment, the jury was certainly not required to infer that comparable jobs would have been readily available.

Because the burden of proof on this issue was on defendants, rather than Fitzpatrick, the lack of evidence establishing whether comparable employment was available to Fitzpatrick in the wake of his termination harms them, not him. In the absence of affirmative and undisputed evidence that comparable employment was *actually* available to Fitzpatrick earlier than the date he commenced his subsequent job, the jury was free to reject defendants' assertion he would have obtained such employment had he sought it, and was free to conclude NWET was liable for whatever wages he would have earned by continuing to work for NWET during that period. [5]

In any event, as Fitzpatrick points out, the testimony of defendants' own financial expert supports the conclusion Fitzpatrick suffered economic damages as a result of his termination. Although this expert assumed Fitzpatrick suffered no loss during his six-month period of unemployment, she concluded he did earn less money for a period of time after he commenced his new job, as compared to what he would have earned by remaining with NWET, and thus his termination did cause him in excess of $11,000 in lost wages. While that total is significantly less than the $37,000 in lost wages awarded by the jury, it is nonetheless sufficient – in and of itself – to demonstrate that NWET was not entitled to entry of a judgment *in its favor* on the issue of lost wages.[6]

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[5] Defendants' argument also ignores the evidence – and the jury's conclusion – that Fitzpatrick was suffering from emotional distress caused by the termination. The jury could have reasonably inferred such distress would have interfered, at least for awhile, with Fitzpatrick's ability to pick himself up, dust himself off, and start all over again with a new employer.

[6] NWET suggests we cannot look to the testimony of defendants' financial expert as evidence supporting Fitzpatrick's claim for financial damages, because that testimony was not part of *Fitzpatrick's* case-in-chief. According to NWET, our review of the order denying the JNOV "should only consider the record presented

Because the record contained sufficient evidence Fitzpatrick suffered a loss of wages caused by NWET's termination of his employment, the trial court did not err in denying NWET's motion for a JNOV on the issue of Fitzpatrick's claim for economic damages.

Fitzpatrick's claim of compensable emotional distress was likewise supported by evidence – albeit just barely. Although Fitzpatrick himself testified only as to his general emotional history – including stress he suffered during his employment with NWET – without actually detailing any increase in distress (or effects of such an increase) caused specifically by NWET's termination of his employment, such evidence is found in the report of Dr. Glaser, the expert hired by defendants in connection with this litigation.[7]

According to Dr. Glaser's report, Fitzpatrick reported suffering significant emotional distress in the months following NWET's termination of his employment. In particular, the report reflects Fitzpatrick experienced significant emotional distress beginning around the time his termination became effective,[8] and experienced "the most intense symptoms" from June of 2004 to September of 2004, including "significant neurovegetative symptoms of depression such as decreased appetite and a 35 pound weight loss, initial, middle, and terminal insomnia, daytime exhaustion, depressed mood, social isolation, and anhedonia." Those symptoms are sufficient to support a

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in Plaintiff's case-in-chief." There is no such rule. A JNOV challenges the sufficiency of the evidence to support the jury's verdict, and thus must take into account all of the evidence submitted to the jury – not just that portion submitted by one side. Defendants' motion for *nonsuit*, by contrast, properly focused on the sufficiency of the evidence offered by Fitzpatrick in his case-in chief. However, NWET has not separately challenged the court's denial of that motion in its opening brief on appeal, and consequently any assertion that ruling was erroneous is waived. (*Estes v. Monroe* (2004) 120 Cal.App.4th 1347, 1352 ["[P]laintiff has waived his appeal as to the latter three causes of action by failing to brief, argue, or discuss the second, third, or fourth causes of action."].)

[7] Again, NWET argues we cannot look to Dr. Glaser's report as evidence supporting Fitzpatrick's emotional distress claim, because it was not offered as part of Fitzpatrick's case. However, as we have already explained (see fn. 6, *ante*,) that assertion is incorrect. Because the jury is entitled to consider all evidence before it in rendering its verdict, our review of a JNOV must also consider all evidence before the jury. In any event, the record in this case demonstrates that while Dr. Glaser was retained by defendants as their expert, his report was admitted into evidence *on behalf of Fitzpatrick*, not defendants.

[8] Fitzpatrick told Dr. Glaser he experienced emotional distress starting about six months from the date he was last *physically* in the office, which was prior to the commencement of his period of family leave.

determination Fitzpatrick suffered compensable emotional distress, at least during that two-month period, in the wake of his employment termination, and given the proximity of that period to the effective date of his termination, the jury was free to infer a causal relationship – even if Dr. Glaser himself did not.

And of course, as NWET points out, Dr. Glaser's report did not express any professional opinion that Fitzpatrick had actually suffered significant emotional distress as a result of his employment termination. But then again, it expressed no opinion at all about Fitzpatrick's mental state at that time. Instead, Glaser's opinion, rendered in January of 2008 (more than three years after NWET terminated Fitzpatrick's employment) was that Fitzpatrick was – at that time – suffering from a "Major Depressive Disorder, recurrent, in partial remission," but that "there is no support for the assertion that termination was the predominant cause" of *that condition*. Glaser also diagnosed Fitzpatrick with a "panic disorder," which "first started sometime in the calendar year 2004, after Mr. Fitzpatrick was out of the Foxconn [i.e. NWET] workplace," but expressed no opinion as to whether those panic attacks might have been triggered by the termination of that employment.

In short, Glaser's report provided the jury with the factual information necessary – quite apart from any expert opinion – to conclude that Fitzpatrick had experienced significant emotional distress in the months following the termination of his employment,[9] and nothing therein precluded them from reaching that conclusion.

Additionally, Fitzpatrick's claim of emotional distress following his employment termination, as reflected in Glaser's report, would have been corroborated by inferences reasonably drawn from the testimony of Fitzpatrick's prior psychiatrist,

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[9] We express no opinion as to whether the statements made by Fitzpatrick to Glaser about his emotional symptoms in the wake of termination were properly admissible to establish the truth of the matters stated, but note only that the report was admitted into evidence without restriction, and consequently the jury was entitled to rely upon it for that purpose. (*Fry v. Pro-Line Boats, Inc.* (2008) 163 Cal.App.4th 970, 974 ["Plaintiff waived any hearsay objection by failing to raise it at trial"].)

Waterfield. Although Waterfield did not personally form any opinions about Fitzpatrick's emotional state in the wake of his employment termination, his conclusions about Fitzpatrick's commitment to NWET and about how badly Fitzpatrick had been affected by its earlier decision to give him a promotion in name only, certainly suggests Fitzpatrick would have suffered significant emotional effects from the actual termination of that employment.

Admittedly, this evidence was not particularly strong, and it did not suggest Fitzpatrick had suffered emotional trauma of significant duration, or of such severity that he might never recover, but it was sufficient to support the conclusion he had suffered *compensable* emotional distress in the period following his termination. And the relatively modest amount of compensation awarded by the jury – $20,000 – reflects that it understood, and accounted for, the relatively modest claim he proved. (Compare *Hope v. California Youth Authority*, *supra* 134 Cal.App.4th at p. 595 [$1,000,000 in emotional distress damages stemming from claim of workplace harassment].)

Based upon the record in this case, we conclude the court did not err in denying the motion for JNOV as it related to the jury's award of emotional distress damages.

III

Having concluded the trial court properly rejected defendant's request for a JNOV in connection with the jury's compensatory damage award, we now consider Fitzpatrick's contention the court erred in granting the JNOV with regard to the jury's awards of punitive damages against defendants NWET and Hon Hai.

First, Fitzpatrick expends significant effort arguing the existence of substantial evidence supporting what he characterizes as the jury's "finding that Hon Hai and NWET were an integrated enterprise." However, to be clear, the jury made no such finding. Instead, the jury merely concluded that Hon Hai "control[ed] the day-to-day employment decisions" of NWET, and made "the final decision regarding employment

matters relating to Daniel Fitzpatrick." That finding was sufficient to justify imposing liability on Hon Hai for NWET's termination of Fitzpatrick's employment, but it did not establish the two companies were legally an "integrated enterprise" for any other purpose. (See *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737.)

And defendants candidly admit they never challenged that factual determination in connection with their request for a JNOV in the trial court, and do not do so on appeal. Consequently, for purposes of reviewing the trial court's order of the JNOV as to punitive damages, we will accept as true the jury's determination that Hon Hai exercised direct control over and NWET's day-to-day employment decisions.[10]

The court's order cited two reasons for granting the JNOV in connection with punitive damages: first, the lack of substantial evidence that any defendant had acted with "malice, fraud or oppression" in connection with the termination of Fitzpatrick's employment; and second, the lack of sufficient evidence to establish any defendant's "current financial worth."

Under California law, a finding of "oppression, fraud or malice," is necessary to support an award of punitive damages. (Civ. Code, § 3294, subd. (a).) Such a finding is warranted where the evidence shows defendant is guilty of a conscious and deliberate disregard of plaintiff's interests. "Conscious disregard of rights is conduct by a defendant who is aware of the probable dangerous consequences of such conduct to

[10] In their reply brief, defendants did purport to "withdraw" their admission that they had not sought appellate review of the jury's determination, characterizing the statement as "inadvertently made." However, in context, we cannot interpret the statement as "inadvertent." Moreover, we cannot agree with defendants' contention that they have, in fact, affirmatively sought appellate review of this issue by "bringing the protective cross-appeal, which directly identifies the April 14, 2009 Judgment as the object of that protective cross-appeal." While defendants' notice of cross-appeal does include a statement that they "protectively cross-appeal . . . from the original judgment entered in this matter on April 14, 2008 should the Court reverse, vacate, overrule or otherwise modify in any way the Judgment Notwithstanding the Verdict entered on July 3, 2008," their opening brief contains no affirmative arguments in support of that protective cross-appeal. The only distinct claim of error addressed in that opening brief is NWET's contention that the court erred in failing to grant a JNOV in connection with the jury's award of compensatory damages. All other affirmative claims of error are consequently waived. This argument borders on disingenuousness.

plaintiff's interests and willfully and deliberately fails to avoid those consequences." (*Smith v. Brown-Forman Distillers Corp*. (1987) 196 Cal.App.3d 503, 516.)

Thus, where a defendant acts wrongfully, but in the belief that its conduct is legally appropriate, an award of punitive damages is not warranted. (*Scott v. Phoenix Schools, Inc.* (2009) 96 Cal.Rptr.3d 159, 170.) In *Scott*, defendant was candid about its reason for terminating plaintiff's employment, and that reason was not in dispute. Instead, the dispute centered upon whether that reason was legally appropriate. Although the court concluded it was not, it nonetheless determined that punitive damages were not available, since "[t]he only evidence of wrongful conduct directed toward Scott was her termination for an improper reason."

By contrast, evidence defendant lied about the reason for terminating plaintiff's employment suggests defendant understood its real reason for doing so was wrongful, did it anyway, and then engaged in a cover-up to avoid liability. Such conduct does give rise to inference that defendants engaged in a "conscious disregard" of the plaintiff's rights. Thus, in *Cloud v. Casey* (1999) 76 Cal.App.4th 895, the appellate court reversed a JNOV granted after a jury awarded punitive damages, in a case where the employer denied plaintiff a promotion on account of her gender, and then provided a false justification for its decision. As the court explained, "evidence that the decisionmaker attempted to hide the improper basis with a false explanation also supports the jury's determination that the conduct was willful and in conscious disregard of [plaintiff's] rights." (*Id*. at p. 912.)

This is such a case. The jury here found that NWET's termination of Fitzpatrick's employment was motivated by his utilization of protected family leave time, and thus directly rejected defendants' claim the termination had merely been part of an innocent round of employee layoffs, prompted by impersonal financial considerations.

Of course, NWET and Hon Hai contend the jury did not conclude they had lied about their real reason for firing Fitzpatrick, but the argument makes little sense.

According to defendants, the jury's rejection of Fitzpatrick's claims of wrongful termination on the grounds of race or national origin, necessarily demonstrates the jury *believed* defendants' explanation that the termination had been based upon legitimate financial considerations. But that conclusion simply does not follow from the premise. The jury's rejection of the race/national origin claim suggests only that it did not believe *that* consideration had motivated Fitzpatrick's termination. It does not say anything at all about what considerations the jury did find significant. For that, we look to the jury's verdict in Fitzpatrick's favor – which reflects the jury's conclusion his termination actually was prompted by his exercise of leave rights under the CFLA, despite defendants' denial.

The jury's conclusion NWET offered a false justification for terminating Fitzpatrick's employment supports the inference NWET understood its true motivation was wrongful, but acted upon it nonetheless and then engaged in an attempt to hide it. Such conduct, in this case as well as in *Cloud*, was sufficient to support the jury's conclusion NWET and Hon Hai acted willfully and in conscious disregard of Fitzpatrick's rights in terminating his employment, and thus we conclude the court erred in granting a JNOV on the basis of insufficient evidence to support a finding defendants acted with malice, fraud or oppression.

The court's second justification for granting the JNOV on punitive damages was that Fitzpatrick failed to introduce sufficient evidence of defendants' current financial worth. That requirement – that a punitive damage award must be supported by evidence of defendant's "financial condition" – was announced in *Adams v. Murakami* (1991) 54 Cal.3d 105. The point of the rule was to ensure that the purpose of a punitive damage award – "to deter, not to destroy" a defendant – was served. (*Id*. at p. 112.) And the court noted that "[a]bsent such evidence, a reviewing court cannot make an informed decision whether the amount of punitive damages is excessive as a matter of law." (*Id*. at p. 118.)

However, "[t]he court in *Adams v. Murakami, supra*, 54 Cal.3d at page 116, footnote 7, declined 'to prescribe any rigid standard for measuring a defendant's ability to pay.' Net worth is the most common measure, but not the exclusive measure. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624-625 [evidence that defendant was 'a wealthy man, with prospects to gain more wealth in the future']; see *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 ['Net worth is too easily subject to manipulation to be the sole standard for measuring a defendant's ability to pay'].) In most cases, evidence of earnings or profit alone are not sufficient 'without examining the liabilities side of the balance sheet.' (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 57, italics omitted; see *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1064-1065.) 'What is required is evidence of the defendant's ability to pay the damage award.' (*Robert L. Cloud & Associates, Inc. v. Mikesell, supra*, 69 Cal.App.4th at p. 1152.) Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680.)

In this case, the amount of evidence relating to NWET's financial condition was quite small, and somewhat conclusory. But those conclusions were offered by very credible sources within NWET itself, and the numbers were impressive, to say the least: NWET's Chief Financial Officer, Bill Jang, testified that NWET's *profits* steadily grew from $10-12 million in 2000, to $18 million in 2003;[11] and another of its senior employees, Ted Dubbs,[12] testified that, as of the time of trial, its economic condition had

[11] What Jang, the CFO, testified to specifically was that NWET's revenues were approximately $10-12 million in 2000, $140 million to $145 million in 2001; $150 million in 2002; and $180 million in 2003. He further testified that NWET's profits were approximately 10 percent of its revenues.

[12] Dubbs testified he was vice-president of business development at NWET from 1998 to 2000, and while he claimed he was technically employed as a vice-president of business development for Foxconn at the time of trial, he conceded his salary was still paid by NWET.

"improved tremendously" as compared to that earlier period. That employee also took pains to inform the jury that NWET was "a 700 million dollar company."[13]

Taken together, this evidence is sufficient to demonstrate that, by its own admission, NWET is highly profitable, wealthy, and as of the time of trial, quite able to absorb the $500,000 punishment meted out by the jury in this case. We do not mean to suggest that a few testimonial assertions about the financial condition of a defendant, like those recited here, would be sufficient evidence of a defendant's financial condition to support a punitive damage award in all cases – clearly, in a situation where the defendant's profit numbers, or the extent of its wealth, were smaller, or those numbers were subject to dispute, a more in-depth analysis of the defendant's financial records might be in order. But where the defendant's own senior personnel concede all the basic information plaintiff needs to establish its ability to withstand a punitive damage award, plaintiff is not obligated to provide documentary corroboration for those admissions. We consequently conclude there was sufficient evidence of NWET's financial condition in this case to support the jury's award of punitive damages against it.

By contrast, however, Fitzpatrick cites no evidence reflecting the current financial condition of defendant Hon Hai in his opening brief. None at all. Instead, he simply asserts that sufficient evidence of "defendants'" financial condition was presented through the evidence pertaining to NWET specifically. But in the absence of other financial evidence pertaining to Hon Hai itself, or evidence establishing in detail the financial relationship between NWET and Hon Hai, evidence of NWET's wealth, standing alone, is insufficient as a matter of law to support an award of punitive damage against this separate defendant.

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[13] Defendants contend that it is impossible to tell what company the employee was referring to when he informed the jury that "we" are a "700 million dollar company." We disagree. The context in which the statement was made was a discussion of NWET's involvement in a particular project, and the specific question which prompted the employee to make the "700 million dollar company" comment was about NWET's handling of that project. In that context, it is pellucidly clear the company he is referring to is NWET.

Nor does defendants' concession Hon Hai was so integrated with NWET that it exercised direct control over NWET's day-to-day employment decisions change the analysis. Integration of operations for purposes of making employment decisions does not necessarily establish that the two companies are financially intertwined in any significant way. In the absence of evidence of Hon Hai's own financial condition, the punitive damage award against it cannot be sustained.

Because Fitzpatrick failed to cite any evidence reflecting Hon Hai's financial condition in his opening brief, he failed to sustain his burden of demonstrating the court erred in granting a JNOV with respect to the award of punitive damages against it. We consequently affirm that aspect of the order.[14]

NWET's final contention in support of the JNOV on punitive damages is not one relied upon by the court in its ruling: i.e., that the *amount* of punitive damages awarded against it was excessive. However, as we have already explained, such an argument is not cognizable as a basis for a JNOV, which is appropriate only when the moving party can establish that it is entitled to have judgment entered *in its favor* as to a specific claim – and a mere reduction in the amount of the punitive damage award would not constitute such relief. The contention that damages awarded were excessive is properly asserted as grounds for an order granting a new trial, rather than as the basis for a JNOV. (Code Civ. Proc., § 657.)

Indeed, defendants in this case did bring a motion for new trial, along with their motion for a JNOV, and properly asserted therein that the punitive damages awarded by the jury were excessive. That motion was denied as moot when the court granted the partial JNOV. Defendants were entitled to challenge that denial as part of

[14] Our decision to affirm the JNOV as to the punitive damages awarded against Hon Hai obviates the need to point out that an award of punitive damages could not be sustained in any event, because the judgment entered did not award any *compensatory* damages against it. (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801.) While it is not clear from our record how Hon Hai managed to escape liability for compensatory damages in the second judgment, when it had been held liable for them in the initial judgment – Fitzpatrick contends in his reply brief that this is simply an "error" which "should be corrected" on appeal – the fact is Fitzpatrick did not raise the point in his opening brief, and thus the error, if any, is waived.

their protective appeal from the original judgment in this case (see *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 924, fn. 7 [denial of a motion for new trial "is reviewable on appeal from the underlying judgment"]), but have not done so.

IV

Fitzpatrick's final contention is that the court erred in taxing category 6 of his cost memorandum, consisting of $18,738.36 in what are characterized as "Attachment expenses." As part of their motion to tax, defendants objected to the entire category, pointing out that Fitzpatrick had neither sought nor obtained any attachments in the course of the litigation, and consequently could not have incurred any such expenses. Defendants suggested Fitzpatrick had instead utilized this item as "a dumping ground for claims of costs clearly not allowable under [Code of Civil Procedure section] 1033.5(a)."

Shortly after defendants file their motion to tax, Fitzpatrick filed an "amended" cost memorandum, but again sought the lump sum of $18,738.36 as "Attachment expenses." In its ruling on the motion to tax, the court struck the entire sum listed "Attachment expenses," noting that "[e]ven on the Amended Memorandum of Costs, plaintiff failed to properly indicate these costs on the form."

Fitzpatrick argues the court erred in striking every single cost item listed in this "Attachment" category, based upon his inference that the court did so only because he had "placed them *in the wrong category* on the form." (Italics added.) We disagree with that inference. The real problem is that neither the original cost memorandum, nor the amended one, identifies these specific costs *at all*. Instead, both memoranda simply include the lump sum requested for "Attachment expenses" on the summary page (which reflects only the *total amount* sought for each category of costs), but then do not include any breakdown of the specific expenses comprising that total on the accompanying "worksheet." It's simply not there. Instead, both worksheets are apparently missing a page, and thus simply skip from category 4 to category 8.

Because Fitzpatrick did not include any description of these costs in the memorandum filed with the court, the court did not err in striking the category in its entirety.

DISPOSITION

The judgment is reversed, and the case remanded with instructions to reinstate the award of $500,000 in punitive damages against NWET. Fitzpatrick shall recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.